FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 569

In The Matter of General Stores Corporation,

Debtor.

LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954,

Petitioner,

vs.

CHARLES H. GRIFFITHS, TRUSTEE IN REORGANIZATION OF GENERAL STORES CORPORATION, Debtor,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

HARRY H. RUSKIN,
JOSEPH ROSENBAUM,
29 S. LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

The Scheffer Press, Inc.—ANdover 3-6850

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The Briefs for Respondent and the Securities and Exchange Commission ("Commission") do not come to grips with the issue.

They say the compensation and fees as determined by the District Court were reasonable. But this only asserts categorically that a determination of the District Court, which pivots about, and is rendered under an assumed obligation to accord "the greatest weight" to, a recommendation of the Commission, a party in the proceedings and one of Petitioner's chief antagonists throughout, is necessarily reasonable.

The Petition, however, presents the question that the District Court should be free in the exercise of its judicial discretion to accept, or reject or modify the recommendations of *any* party, including the Commission, without giving reasons,—other than making its own findings of fact.

The Respondent and the Commission argue that the District Court arrived at an independent judgment. This cannot be so, as the District Court specifically referred to decisions of the Court of Appeals for the Second Circuit which it said:

> "made it clear that recommendations of the Securities and Exchange Commission with respect to allowances are entitled to the greatest weight" (R. 337a).

and from *Finn* v. *Childs Co.*, 181 F. 2d 431, that

> "'recommendations for allowances by the S. E. C. should be followed unless the reorganization judge should reason otherwise based on specific findings.'" (R. 332a)

The infirmity in the rulings below is that both courts deemed the District Court so restricted and obliged to give such credence and weight to the Commission, an active party and adversary of the Petitioner in the proceedings. The Commission's Brief (p. 7) seeks to mitigate the reach of *Finn* v. *Childs, supra*, by quoting a clause from *Surface Transit, Inc.* v. *Saxe, Bacon and O'Shea*, 266 F. 2d 862, 865*. But, The Court below in the case at bar quoted

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* The Petition for a Writ of Certiorari in this case (Oct. Term 1959 No. 285) referred to in the Commission's Brief was filed by the attorney for the reorganization trustee, an officer of the Court, challenging the allowance of fees to him—a matter of discretion—and did not involve or raise any of the questions presented in the Petition in the case at bar.

with approval from *Finn* v. *Childs, supra.* Thus the rule in effect in the Second Circuit requires the District Court to mobilize judicial reason to overcome Commission recommendation as fully as if it were overruling a master's report.

The Committee report (p. 48), referred to in the Commission Brief (p. 9), itself discloses the Commission was not to share in the judicial function, even where the Statute authorized action by the Commission. H. Rep. No. 1409, 75th Congress, First Sess. 1937, p.48, states that Commission reports on plans are to be "advisory only" in order to avoid "the possible attendant delay and confusion if the power of the court is shared with the administrative agency," and, p. 45, in discussing compensation and allowances makes no mention of the Commission. Moreover while the bill, as proposed, would have permitted the Commission to become a party merely on notice of its appearance (*ibid.* p. 105), the Statute as enacted made it subject to Court request or approval (11 U.S.C. §608).

The Opposition Briefs in arguing that the District Court allowed $3000.00 more than the Commission recommendations for Petitioner omit to consider that the Court accepted the $6000.00 figure but added the $3000.00 for Petitioner's services rendered to the subsidiaries and which the Commission deemed compensable by the subsidiaries and not the Debtor (R. 143a, 353a, 320a, 321a). Moreover, the Court of Appeals viewed the $6000.00 per year recommendation of the Commission as a formidable hurdle for Petitioner to overcome (Pet. 38).

The Commission's Brief argues that its impartiality is no more impaired by participation in the case as an active party than a judge whose decision is reversed (Comm.

Br. 8). But such a judge, unlike the Commission, maintains his judicial position throughout. Unlike the Commission, such judge never steps off the bench to join as a party in the litigation before him or to file briefs and advocate positions in a reviewing court adverse to the complaining litigant. How impartial would the Commission consider one of the judges of a three judge court who, in a case pending before it, entered his appearance for a class of persons whose financial interests were adverse to the complaining litigant, and who actually opposed in every step of the proceedings every effort of the complaining litigant to enforce his contract and opposed the litigant in appeals (Pet. 16-19), and then returned to the bench to pass on the services of the complaining litigant and his counsel in enforcing these contract rights so opposed by the judge in his capacity as advocate?

The Commission does not deny there are no standards or regulations published to assure that personnel making recommendations do so free from influence of personnel taking an adversary role in the proceedings. The need for the safeguard is especially evident in the case at bar. The services for which compensation and fees were requested arose from Petitioner's enforcement of his rights under the Collateral Agreement; and the Commission's participation in the proceedings in behalf of public stockholders, whose interests were in conflict with Petitioner's, consisted in opposing precisely these efforts of Petitioner and his attorneys. Notwithstanding final capitulation by an amended plan providing for full payment in cash of the secured debt, as Petitioner had continuously demanded, the opposition continues still primarily for the stockholders of the Debtor, rather than disinterestedly.

CONCLUSION.

Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

HARRY H. RUSKIN,
JOSEPH ROSENBAUM,
Attorneys for Petitioner.

Chicago, Illinois,
January 8, 1960.